



**Wemali v Rhombus Concrete Limited; National Environment Management Authority (Interested Party) (Environment and Land Constitutional Petition E046 of 2021) [2024] KEELC 1808 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1808 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E046 OF 2021**

**EK WABWOTO, J**

**MARCH 20, 2024**

**IN THE MATTER OF ARTICLES 2,19,20,21,22,23,42,69,70,258 & 259(1) OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS ENSHRINED IN ARTICLE 42 OF THE CONSTITUTION.**

**IN THE MATTER OF CONTRAVENTION OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT.**

**BETWEEN**

**BETWEEN**

**BENSON WEMALI ..... PETITIONER**

**AND**

**RHOMBUS CONCRETE LIMITED ..... RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner in the petition dated 5<sup>th</sup> November 2021 seeks the following reliefs; -
  - i. A declaration that the Respondent violated Article 27 of *the Constitution* by acting in a discriminatory manner against the Petitioner and denying him equal protection of the law.



- ii. A permanent order restraining the Respondent from making any further disposal, storage or dumping of any form of waste in the subject location.
  - iii. A mandatory order compelling the Respondent to forthwith remove all wastes currently deposited in the subject location and restore location and restore the environment to its original state, to the satisfaction of the interested party and the petitioner.
  - iv. Alternative to prayer (iii) an order mandating the interested party to carry out the environmental restoration at the cost of the Respondent.
  - v. An order of damages against the Respondent for environmental pollution.
  - vi. Costs of the suit to be paid by the Respondent.
2. The petition was contested. On the record there is a Replying Affidavit sworn by Solomon Wangai, a Managing Director of the Respondent on 11<sup>th</sup> July 2023 and another affidavit sworn on 8<sup>th</sup> March 2022. There was no response filed by the Interested Party.
  3. The Petitioner contended that the Respondent has consistently converted a piece of land adjacent to Karura Forest and within a human habitat to a dumping site where the Respondent disposes hazardous construction wastes including construction dusts, used paint, asbestos and other chemicals considered noxious to human and animals.
  4. The Respondent's action converting a residential location to a dump site is without the Interested Party's authorization and in any case is violation of Article 42 of *the Constitution*.
  5. There are designated location and procedures for safely disposal those kinds of noxious wastes, and the Respondent has flagrantly violated these procedures in dumping in a residential area and without regard to health of human and animals located in the area.
  6. The Petitioner has brought this Petition under Article 70 of *the Constitution* to enforce the right to clean and healthy environment on behalf of the public and in public interest.
  7. Article 42 of *the Constitution* provides for right to clean and health environment and obliges every person to act in a manner that protects the environment as opposed to degrading it.
  8. It was averred that the Respondent, by carrying out dumping and waste disposal contrary to laid down procedures and without authorization and by directing and storing noxious and hazardous wastes to a human settlement has violated Article 42 of *the Constitution* and exposed members of public to dangers of environmental pollution.
  9. It was also contended that the Respondent in its actions was also in breach of Sections 3(3) Sections 87, 88, 89 and 93 of the Environmental Management and Coordination Act.
  10. The Respondent in opposing the Petition averred that the registered owner of the parcel of Land L.R No. 209/5989/14 along Kiambu Road and had applied to the relevant Authorities to restore and back fill part of its land, which had previously been exploited as a quarry, where water was stagnating and people using it illegally as a dumping site. The owner of the property has been duly authorized by the relevant Authorities to carry on the project of restoring the quarry site to an economically exportable and environmentally friendly status. It was averred that at no point has any pollutant products been used in the back-filing exercise. The surrounding environment has not been disturbed, the tree cover in the neighbourhood and the air quality remains perfect. The reclamation project will thus not negatively impact on the welfare of the members of the society is an environmentally friendly and not a health hazardous to the local community as portrayed and exaggerated by the Petitioner.



11. The Respondent denied ever infringing on the Petitioner's statutory or constitutional rights or otherwise to warrant being enjoined. It was also averred that the orders sought if granted will cause more hardship to the Respondent's and create an advantage to the petitioner.
12. Parties were also directed to file and exchange their written submissions in respect to the Petition herein. The Respondent complied and duly filed its written submissions dated 24<sup>th</sup> January, 2024. No written submissions were filed by the Petitioner and the Interested Party despite being given an opportunity to do.
13. In its submissions, the Respondent reiterated the averments' made in the affidavit and added that there was no evidence that the land was being used as a dumping site. It was also submitted that the Respondent's landlord did carry out an Environmental and Social Assessment Report, providing for all mitigation measures at page 41 to 51 of the same. It was also submitted that the concerns of the pollution raised by the petitioners have all been addressed and mitigation measures put in place pursuant to the EIA license issued by the Interested party on 14.12.2021.
14. Counsel for the Respondent also outlined and submitted on the following issues; whether the back-filing project will lead to degradation of surrounding environment, whether the project will curtail or hinder the Petitioner from enjoying clean and healthy environment and whether the Respondent should be permanently enjoined from back filing.
15. Counsel submitted that the allegation that the material deposited on the land have noxious chemicals remains a mere allegation which has not been substantiated or supported by any scientific or chemical analysis and no such results or reports have been submitted to the court by the Petitioner.
16. It was also submitted that there are no particulars of noise pollution highlighted by the Petitioner in a project of backfilling and restoration. Some inconvenience usually arises and have adequately been addressed and measures put in place.
17. Citing the provisions of Sections 107 and 108 of the Evidence Act, it was argued that the Petitioner had failed to prove that his rights were violated and reliance was placed to the following cases; Uhuru Muigai Kenyatta –vs- Nairobi Star publications Ltd [2013] eKLR and Leonida Aloo Odhiambo –vs- Attorney General & Another [2020] eKLR.
18. The Respondent argued that the Petitioner's statutory or Constitutional rights have not been infringed and urged the Court to dismiss the Petition with costs.
19. From the pleadings and submissions filed by the Respondent, the issues that arise for determination are as follows: -
  - i. Whether the Respondent violated the provisions relating to a clean and health environment.
  - ii. Whether the Respondent's actions amounted to an infringement of the Petitioner's Constitutional and statutory rights.
  - iii. What are the appropriate reliefs.

This court shall now proceed to analyse the said issues sequentially.

20. In the instant case, the Respondent denied ever dumping waste on the suit property. They also denied ever dumping any toxic or hazardous substances on the property.
21. However, this Court upon evaluating the evidence tendered herein, it clearly emerged and as admitted by the Respondent that there was restoration and backfilling on the portion of the land known as L.R



No. 209/5989/14 which had been exploited as a quarry where water was stagnating and people used it illegally as a dumping site. This position in itself does not rule out any possibility of illegal dumping on the site currently or in the near future. The Court is of the view that the Respondent having leased the premises, he is obligated to ensure that the same is protected from any pollution which could affect the right to a clear and healthy environment of the neighbours. In view of the foregoing, it is the finding of this court that the Respondent's action of failing to protect the site from previous acts of illegal dumping constituted an infringement of the right to a clean and healthy environment of the petitioners and other residents of the area. The site had not been licensed as a dumpsite.

22. The significance of a person's right to a clean and healthy environment was aptly captured by the African Commission on Human and People's Rights in Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria as follows;

“As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

23. By failing to abide by the mandatory provisions of the *Environmental Management and Co-ordination Act*, which I have enumerated above, the Respondent and the Interested party herein failed to protect and ensure a clean and healthy environment, a right which includes but is not limited to elimination of processes and activities that are likely to endanger the environment.

24. In *Martin Wanyonyi C.E.O Centre for Human Rights Organization & Another vs. County Government of Bungoma & 2 others* [2019] eKLR, the Court found that the constitutional right to a clean and healthy environment under Article 42 of *the Constitution* had been breached by the establishment of a dumpsite by the County Government of Bungoma. The court held as follows:

“Among the annexures to this Petition are photographs of the dump site at Lumoro village. To refer to the dump site as an eye sore is clearly an understatement and I have not heard the Respondents refer to it in any other flattering terms. It is no doubt a violation of the right to a clean and healthy environment which the residents of Lumoro village are entitled to by law. The Respondents cannot really deny that.”

25. One of the principles that guide this court in the exercise of its jurisdiction is the precautionary principle as outlined Section 18 of the *Environment and Land Court Act* and Section 3(5) of the *Environmental Management and Co-ordination Act*). The precautionary principle is one of the most popular and commonly applied principles of sustainable development. The principle is based on Principle 15 of the Rio Declaration on Environment and Development, which Kenya is a signatory to, which states as follows:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (Rio Declaration on Environment and Development, 1992).”

26. It is clear that the Respondent was in blatant breach of Articles 40, 42, and 70 of *the Constitution* as read with Sections 3, 58, and 87 of the *Environmental Management and Co-ordination Act* and in violation of the Petitioner's right to a clean and healthy environment.



27. In the instant petition, while the Respondent have maintained that currently there is no dumping of waste at the site, it still remains that there is no guarantee if the same will be kept free from illegal dumping and protection from pollution. Considering the need to resolve the issues raised by the Petitioner this court is inclined to invoke the principle in “dubio pro natura” which is a maxim meaning that when in doubt as to whether an activity harmful to the environment should proceed, the doubt should be resolved in favour of protecting the environment. Promoting the in “dubio pro natura” principle as an independent criterion, and possibly constitutionalizing it together with other principles of fundamental importance, such as those of prevention, precaution, and non-regression, would help to guide all legislation not merely environmental legislation in favour of the nature.
28. Being guided by the above, this Court shall proceed to grant reliefs necessary for the protection and conservation of the environment.
29. In conclusion, this Court makes the following final orders;
- i. A declaration be and is hereby issued that the petitioner’s right to a clean and healthy environment as guaranteed by Article 42 of *the Constitution* has been violated by the acts and or omissions of the Respondent.
  - ii. A prohibitory injunction is hereby issued restraining the Respondent from making any further disposal, storage or dumping of any form of waste in respect to L.R No. 209/5989/14.
  - iii. Each party to bear own costs of the petition.

Judgement accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**E.K. WABWOTO**

**JUDGE**

**In the presence of:-**

No Appearance for the Petitioner.

Mr. Mahinda for the Respondent.

No Appearance for the Interested Party.

Court Assistant; Caroline Nafuna.

